TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~307.~~ 87 14

DANIEL C. SAWIN, PLAINTIFF IN ERROR,

vs.

DENNIS G. KENNY AND THOMAS FOLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 27, 1873.

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INDEX.

	Original.	Print.
Writ of error	1	1
Complaint	3	1
Exhibit A	13	5
Exhibit B	15	5
Summons	19	7
Answer of D. C. Sawin	23	8
Answer of Railroad Company	30	10
Verdict	32	11
Judgment	32	11
Motion in arrest of judgment	33	12
Bond	35	12
Citation	37	13
Clerk's certificate	39	14

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Den'is G. Kenny & Thomas Foley, against Daniel C. Sawin, who was impleaded therein with the Little Rock, Pine Bluff & New Orleans Railroad Company, a manifest error hath happened, to the great damage of the said Daniel C. Sawin, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Chief-Justice of the Supreme Court of the United States this fifth day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] FRANK E. WRIGHT,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.
By RALPH L. GOODRICH,
Deputy Clk.

Allowed by—
HENRY C. CALDWELL,
Dist. Judge.

2 The execution of this writ of error appears by the schedule hereto annexed.
RALPH L. GOODRICH, *Clerk.*

3 Be it remembered that on the twenty-first day of September, A. D. 1872, came into the clerk's office of the circuit court of the United States for the eastern district of Arkansas, Dennis G. Kenny and Thomas Foley, by Messrs. Gallagher and Newton, their attorneys, and filed therein their complaint and exhibits thereto against the Little Rock, Pine Bluff and New Orleans Railroad Company, which complaint is in the words and figures following, to wit:

The plaintiffs, Dennis G. Kenney and Thomas Foley, who are citizens of and residents in the State of Tennessee, state: On the seventeenth day of October, A. D. eighteen hundred and seventy, they entered into written articles of agreement with the defendant, the Little Rock, Pine Bluff and New Orleans Railroad Company, a corporation duly incorporated under and by virtue of the laws of the State of Arkansas, and commorant in said State and in the eastern district thereof, the said

defendant, the Little Rock, Pine Bluff and New Orleans Railroad Company, acting by her duly authorized agent in this behalf, Daniel
4 C. Sawin, one of the directors at the time, and large stockholder of and in the said railroad company, and duly authorized and empowered by said railroad company to make any and all contracts in behalf thereof for the building and construction of the same and for obtaining the necessary supplies, labor, and materials for that purpose, the said Daniel C. Sawin, signing his own individual name to said written articles of agreement and contract, and then and there representing to said plaintiffs, that he was acting in behalf of and representing said railroad company, his codefendants herein, under full authority so to do, and so acting in the premises, as plaintiffs state, and which articles of agreement and contract was solely entered into and afterwards performed on their part by said plaintiffs upon that understanding, and none other whatsoever. By which said articles of agreement in writing and contract the said defendant, the said railroad company, party of the first part thereto, by her said agent, her codefendant hereto, Daniel C. Sawin, agreed and bound herself that she would let that portion of her road, meaning thereby the said Little Rock, Pine Bluff
5 and New Orleans Railroad, and the clearing, grading, and furnishing the ties thereon, known as the 4th division, commencing thirty miles south of Pine Bluff and running ten miles south on the road known as the Little Rock, Pine Bluff and New Orleans Railroad, unto the said plaintiffs, the party of the second part to said contract and written articles of agreement, and that the said defendant the said railroad company would pay the said plaintiffs for their work and labor done under said letting, as follows, to wit: for clearing fifty feet wide two hundred dollars per mile, not including grubbing, and thirty-eight cents in addition per cubic yard for earth embankment, and the further sum of thirty-five cents for each tie distributed on the grade or side of road-bed; and it was then and there further agreed by and between said plaintiffs and said railroad company aforesaid, defendant herein as aforesaid, that she would pay to said plaintiffs monthly, on or before the 15th day of each month, for all the work done according to the engineer's estimate, as well as for the ties furnished under said contract, the said defendant, the said railroad company, in and by the terms and provisions and conditions of said within contract, being entitled from
6 said payments to retain ten per cent. in value of all the work done according to the engineer's estimate until the completion of the clearing and road-bed, as in like manner ten per cent. of the value of all the ties furnished until all were distributed on or by the side of the road-bed; and it was then and there agreed by said plaintiffs and said railroad company, defendant aforesaid, that the ties for the road should be eight feet long, six inches face, and six inches thick, and were to be of hard wood, such as white-oak, cypress, persimmon, red-heart gum, and locust; and the said defendant, the said railroad company, by her said agent the said codefendant Daniel C. Sawin, her contractor as aforesaid, then and there by said written agreement agreed to receive each mile of the road-bed when graded according to the requirement of the engineer of said railroad company, and on his certificate of the same; and thereupon the said plaintiffs should have no further work to do upon such portion of the said railroad, nor be under any further liability on account thereof; and it was further agreed that said work in said contract specified should be completed on the 13th of December next after the date
7 of said written agreement, and that in case the work did not progress to the satisfaction of the engineer of said defendant, the

said railroad company, then that said defendant, the said railroad company, could have the privilege of augmenting the force (i. e. the laborers thereon) as the defendant, the said railroad company, might deem necessary for the more speedy completion of the work; which articles of agreement and contract in writing were thereupon duly made and executed by the parties thereto, as above stated, the said defendant Daniel C. Sawin signing his own name thereto, and affixing his private seal, as likewise did said plaintiffs, on the said 17th day of October, A. D. 1870, a true and correct copy whereof is herewith exhibited and prayed to be made part hereof.

Said plaintiffs further state that upon the entering into said contract in writing as aforesaid by and between the said plaintiffs and the said defendant, the Little Rock, Pine Bluff and New Orleans Railroad Company, by their said agent, Daniel C. Sawin, as aforesaid, the said plaintiffs employed a large force of laborers and proceeded in accordance with their said contract to clear, grade, and furnish the ties thereon and
8 distribute the same along the side of said road; that the reason the time of completing said road, or rather section of said railroad, in said written contract mentioned was fixed at the time it was in said contract, to wit, on the 15th of December, A. D. 1870, was that said defendant, the said railroad company, informed and assured said plaintiffs that the road would overtake their work; that is to say, that as plaintiffs finished their work, the said railroad company would put it in running order; but in a short time the said railroad company, from want of funds and other embarrassments, found that they could not finish and equip the road except after the lapse of some considerable time, and therefore informed the said plaintiffs that they could perform their work and labor and perform their part of the contract at their own reasonable leisure and convenience; and said plaintiffs further state that they did proceed in such work and labor and furnishing said materials all in strict compliance with their said contract, and would from time to time presents their estimates to the said defendant, the said railroad company, and demanded that the defendant, said railroad company, should
9 direct their engineer to examine and approve the same; and that the said railroad company should pay to said plaintiffs the amount due on said monthly estimates, but this the said railroad company neglected to do, and merely had the estimates allowed and made payments from time to time as suited the option of said company, thereby greatly embarrassing and injuring financially the said plaintiffs in their business operations; and the said plaintiffs say that they continued to furnish such supplies or materials and perform such labor for said railroad company under said contract until on or about the 3d day of July, A. D. 1871, when they completed all the work and furnished all the materials that were required of them by said railroad company, and which was accepted and approved by said railroad company; and said plaintiffs aver that the said defendant, the said Little Rock, Pine Bluff and New Orleans Railroad Company on the said 3d day of July, 1871, after giving said defendant all credits for payments made by her to plaintiffs from time as said work progress , was indebted to the said plaintiffs in the sum of eleven thousand five hundred and ninety-six dollars and seventy-seven cents for work and labor and materials, done, per-
10 formed, and furnished by the said plaintiffs to the defendant, the said railroad company aforesaid, under and by virtue of said written contract aforesaid; and plaintiffs aver that they are entitled to recover of and from said defendant, the Little Rock, Pine Bluff and New Orleans Railroad, said sum, with interest from that date at the rate

of six per cent. per annum, subject to a credit for further payments made to said plaintiffs upon said account as hereinafter stated; and that said defendant, Daniel C. Sawin, by signing said contract, also became liable under said contract jointly with his codefendant, the said railroad company.

The said plaintiffs further state that on or about the 3d day of July, A. D. 1871, the said plaintiffs having performed all the work and labor required as well as furnished all the materials required under said contract, the same was considered as fully complied with on the part of said plaintiffs by said defendants; but plaintiffs aver that the said contract has not yet been complied with by said defendants, because said plaintiffs say that they have presented an account to said rail-
11 road company time and time and again of the amount due them for their labor, &c., under said contract, furnishing the specific items and showing in the account a detailed statement of the items of credit and debit and demanded payment thereof, but that said railroad company, although admitting said account to be just, yet would not pay the whole amount of the same, but would at different times, up to the 12th of January, A. D. 1872, when said defendants made the last payment to the said plaintiffs, from which time the said defendant the said railroad company, as well as their said agent and contractor, the said Daniel C. Sawin, have wholly failed and refused to pay any further amount upon their said indebtedness to said plaintiffs as aforesaid.

And said plaintiffs aver that said defendant, the said railroad company, by virtue of said contract, and the said defendant Daniel C. Sawin, by signing the same and making himself party thereto, on the said 12th day of January, A. D. 1872, were indebted to said plaintiffs for work and labor done and materials furnished under said written contract in the principal sum of eight thousand eight hundred
12 and sixteen dollars and eight cents, besides such interest *and* may be allowed by this court as accruing between different payments in regard to time, all of which will more fully appear by reference to a full and complete account containing all the items of debits and credits that arose under said written contract, and filed herewith and made part hereof, marked B.

Wherefore said plaintiffs pray judgment for said sum of eight thousand eight hundred and sixteen dollars and eight cents and interest, and for all other proper relief.

GALLAGHER & NEWTON,
Attys. for Pl'ffs.

UNITED STATES OF AMERICA,
Eastern District of Arkansas, sct:

I, Dennis G. Kinney, one of the above-named plaintiffs, do state on oath that I believe the statements in the foregoing complaint contained to be true.

DENIS G. KINNY.

Sworn to and subscribed before me this the 20th day of September, A. D. 1872.

FRANK E. WRIGHT, *Clk.*,
By RALPH L. GOODRICH,
Dep'ty Clk.

13 EXHIBIT A.

Which Exhibit A is in the words and figures following, to wit:

Copy of the written contract referred to and made part of Paragraph III of the complaint in the above-entitled cause.

"Articles of agreement made and entered into this 17th day of October, 1870, by and between D. C. Sawin, of Chicora, State of Arkansas, of the 1st part, and D. G. Kenny and Thos. Foley, of the city of Memphis and State of Tennessee, of the 2d party, witnesseth that, for and in consideration of the terms hereinafter mentioned, the said first party agrees to let that portion of his road, to clear, grade, and furnish the ties thereon, known as the 4th division, commencing thirty miles south of Pine Bluff, and running ten (10) miles south on the road known as the Little Rock, Pine Bluff and N. Orleans Railroad, said first party is to give said 2d party for clearing fifty (50) feet wide, two hundred (200) dollars per mile, (not including grubbing;) thirty-eight (38) cents per cubic yard for earth-embankment, and thirty-five (35) cents per tie, distributed on the grade or side of road-bed. Said second party is to receive monthly payments on or before the 15th of each month for all the
14 work according to the engineer's estimate, retaining ten per cent. until the completion of the clearing and road-bed, and the same on the ties, until all are distributed on or by the side of road-bed. Ties are to be 8 feet long, 6 inches face, and 6 inches thick; are to be of hard wood, such as white-oaks, cypress, persimmons, red-heart gum and locust.

The first party agrees to receive each mile of the road-bed when graded according to the requirements of the engineer, and on his certificate of same, and 2d party will have no further work to do on it. The work, to be completed on the 15th of December next.

In case the work does not progress to the satisfaction of the engineer, then the first party can have the privilege of augmenting the force as he may deem necessary for the more speedy completion of the work.

In witness whereof we have hereunto affixed our seals and signed our names this the 17th day of October, 1870.

(Signed) D. C. SAWIN. [SEAL.]
D. G. KENNY. [SEAL.]
THOS. FOLEY. [SEAL.]

Witness:

A true copy of the original contract in our hands.

GALLAGHER & NEWTON,
Attys. for Plainffs.

15 EXHIBIT B.

Which Exhibit B is in the words and figures following, to wit:

Little Rock, Pine Bluff and New Orleans Railroad Company, Daniel C. Sawin, contractor.

A. D. 1871.
July 3. To total amount of estimates of earth-embankment, 40,445 cubic yards, at 38 cents per yard 15,396 10
1871.
July 3d. To clearing roadway, 50 feet wide, 8 miles and 560 lineal feet, @ $200 per mile 1,621 20
1871.

July	3.	To cross-ties got out, and distributed, and received, 25,497, @ 35 cents per tie		8,923 95
1871.				
July	3.	To ties piled up, received, but not distributed, 945, @ 35 cents per tie.		330 75
		To cash for bill of provisions furnished I. W. Perkins, and accepted by D. C. Sawin		33 00
		To interest charged us by Toof, Phillips & Co., on bill of groceries, (we not receiving our money for estimates from D. C. Sawin)		37 32
1870.				
Oct.	19.	By lumber, say 3,000 feet, @ $25 per th	75 00	
Dec.	26.	" cash on account of estimates	2,000 00	
	Dec.	26. By check on 1st Nat. Bk., Memphis	25 00	
16		By acceptance of our draft to Toof, Phillips & Co., for grocery bill	739 60	
1871.				
Jan.	11.	By acceptance of order by us to S. S. Terry	631 36	
	16.	By acceptance of order by us to J. W. Perkins	2,269 04	
	"	By acceptance of order by us to John Stewart (One yoke of oxen sold by J. Stewart to J. W. Perkins.)	60 00	
Jan'y	22.	By cash on account of estimates to our clerk, William Boland	2,000 00	
M'ch	2.	By acceptance of our order to E. D. Miller	487 44	
"	"	By acceptance of ours to Young	39 40	
	4.	" " " 5 orders to M. L. Barker	1,315 65	
	12.	By cash to Thomas Foley	1,000 00	
	16.	" acceptance of our orders:		
		One to Lockheart	67 14	
		Sparti	54 32	
		Neill	160 62	
		Jackson	144 62	
		Hony	62 45	
	18.	Lee	50 00	
	"	Hanson	50 00	
Ap.	11.	Lee	127 25	
	28.	John Stewart	90 68	
17		Charles Kelly	90 68	
		By cash to Thomas Foley	800 00	
		" " John Stewart	100 00	
May	22.	" Thomas Foley	500 00	
"	"	" acceptance of our draft to Toof, Phillips & Co., grocery bill	890 80	
June	5.	By acceptance of our draft to Toof, Phillips & Co	194 50	
	13.	" acceptance of our order to S. S. Terry	500 00	
	"	" Oliver Anderson	50 00	
	22.	" cash to Thomas Foley	20 00	
July	3.	" acceptance of ours to Oliver Anderson	50 00	
	13.	" " John Stewart	47 30	
		Perry	47 30	
Aug.	1.	cash to Thomas Foley	50 00	
	10.	"	350 00	
	19.	" acceptance of our order to John Perry	115 56	
		Stewart	81 56	
	21.	" cash to Thomas Foley	500 00	
Oct.	18.	" cash to Thomas Foley	500 00	
1872.				
Jan.	12.	" "	1,000 00	
		By cash to Father Quin	57 00	
		" " Fred. Bolman	83 50	
		" " H. Smith's store	15 40	
		" deduction on the price of 945 cross-ties not distributed on R. R. track, ten per ct. on $330.75	33 07	
			17,526 24	26,342 32
18		Forward		26,342 32
				17,526 24
		Balance due		$8,816 08

Summons.

And on the same day the clerk issued a writ of summons, which is in the words and figures following, to wit:

19 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

The President of the United States to the marshal of the eastern district of Arkansas, greeting:

You are hereby commanded to summon the Little Rock, Pine Bluff and New Orleans Railroad Company and Daniel C. Sawin, if they be found within your district, to appear before the judges of our circuit court of the United States, in and for the eastern district of Arkansas, at the United States court-room, in the city of Little Rock, on the first day of our next October term, 1872, to answer a complaint filed against them by Dennis G. Kenny and Thomas Foley, and warm that upon their failure to answer, the complaint will be taken for confessed. And have you then and there this writ, with the manner of execution hereof indorsed hereon.

In testimony whereof Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed this 21st day of September, A. D. 1872, and on the 97th year of our Independence.

Attest:

[L. S.] FRANK E. WRIGHT, *Clerk*,
By RALPH L. GOODRICH, *D. C.*

20 (Indorsed:) No. . U. S. circuit court, eastern district of Arkansas. vs. . Summons. Issued . Returnable . Damages . Returned and filed Nov. 4, '72. Frank E. Wright, clerk, by Ralph L. Goodrich, D. C. , plaintiff's attorney.

In obedience to the within writ, I have summoned the within-named Daniel C. Sawin, of Chicot City, Arks., by leaving the same *to him in his presence and hearing* at his residence, in the eastern district of Arkansas, on this 29 day of Sept., A. D. 1872.

The other officers of the road non est.

ISAAC C. MILLS,
U. S. Marshal,
By HENRY C. BURKS,
Deputy Marshal.

21 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered, that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 28th day of October, anno Domini one thousand eight hundred and seventy-two, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on November 22d. A. D. 1873, as follows:

DENNIS G. KENNY & THOMAS FOLEY
vs.
THE LITTLE ROCK & PINE BLUFF & NEW Orleans R. R. Co.

Comes T. D. W. Yonly, esq., and enters herein the appearance of the

July	3.	To cross-ties got out, and distributed, and received, 25,497, @ 35 cents per tie		8,923 95
1871.				
July	3.	To ties piled up, received, but not distributed, 945, @ 35 cents per tie.		330 75
		To cash for bill of provisions furnished I. W. Perkins, and accepted by D. C. Sawin		33 00
		To interest charged us by Toof, Phillips & Co., on bill of groceries, (we not receiving our money for estimates from D. C. Sawin)		37 32
1870.				
Oct.	19.	By lumber, say 3,000 feet, @ $25 per th	75 00	
Dec.	26.	" cash on account of estimates	2,000 00	
	Dec.	26. By check on 1st Nat. Bk., Memphis	25 00	
16		By acceptance of our draft to Toof, Phillips & Co., for grocery bill	739 60	
1871.				
Jan.	11.	By acceptance of order by us to S. S. Terry	631 36	
	16.	By acceptance of order by us to J. W. Perkins	2,269 04	
	"	By acceptance of order by us to John Stewart (One yoke of oxen sold by J. Stewart to J. W. Perkins.)	60 00	
Jan'y	22.	By cash on account of estimates to our clerk, William Boland	2,000 00	
M'ch	2.	By acceptance of our order to E. D. Miller	487 44	
"	"	By acceptance of ours to Young	39 40	
	4.	" " " 5 orders to M. L. Barker	1,315 65	
	12.	By cash to Thomas Foley	1,000 00	
	16.	" acceptance of our orders:		
		One to Lockheart	67 14	
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		Neill	160 62	
		Jackson	144 62	
		Hony	62 45	
	18.	Lee	50 00	
	"	Hanson	50 00	
Ap.	11.	Lee	127 25	
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		By cash to Thomas Foley	800 00	
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May	22.	" Thomas Foley	500 00	
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	13.	" acceptance of our order to S. S. Terry	500 00	
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		Stewart	81 56	
	21.	" cash to Thomas Foley	500 00	
Oct.	18.	" cash to Thomas Foley	500 00	
1872.				
Jan.	12.	" "	1,000 00	
		By cash to Father Quin	57 00	
		" " Fred. Bolman	83 50	
		" " H. Smith's store	15 40	
		" deduction on the price of 945 cross-ties not distributed on R. R. track, ten per ct. on $330.75	33 07	
			17,526 24	26,342 32
18		Forward		26,342 32
				17,526 24
		Balance due		$8,816 08

Summons.

And on the same day the clerk issued a writ of summons, which is in the words and figures following, to wit:

19 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

The President of the United States to the marshal of the eastern district of Arkansas, greeting:

You are hereby commanded to summon the Little Rock, Pine Bluff and New Orleans Railroad Company and Daniel C. Sawin, if they be found within your district, to appear before the judges of our circuit court of the United States, in and for the eastern district of Arkansas, at the United States court-room, in the city of Little Rock, on the first day of our next October term, 1872, to answer a complaint filed against them by Dennis G. Kenny and Thomas Foley, and warn that upon their failure to answer, the complaint will be taken for confessed. And have you then and there this writ, with the manner of execution hereof indorsed hereon.

In testimony whereof Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed this 21st day of September, A. D. 1872, and on the 97th year of our Independence.

Attest:
[L. S.] FRANK E. WRIGHT, *Clerk*,
By RALPH L. GOODRICH, *D. C.*

20 (Indorsed:) No. . U. S. circuit court, eastern district of Arkansas. vs. . Summons. Issued . Returnable . Damages . Returned and filed Nov. 4, '72. Frank E. Wright, clerk, by Ralph L. Goodrich, D. C. , plaintiff's attorney.

In obedience to the within writ, I have summoned the within-named Daniel C. Sawin, of Chicot City, Arks., by leaving the same *to him in his presence and hearing* at his residence, in the eastern district of Arkansas, on this 29 day of Sept., A. D. 1872.

The other officers of the road non est.

ISAAC C. MILLS,
U. S. Marshal,
By HENRY C. BURKS,
Deputy Marshal.

21 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered, that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 28th day of October, anno Domini one thousand eight hundred and seventy-two, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on November 22d. A. D. 1873, as follows:

DENNIS G. KENNY & THOMAS FOLEY
vs.
THE LITTLE ROCK & PINE BLUFF & NEW Orleans R. R. Co.

Comes T. D. W. Yonly, esq., and enters herein the appearance of the

said railroad company and of the defendant D. C. Sawin, and come the plaintiffs, by Gallagher and Newton, esqs., their attorneys, and by agreement of parties this cause is continued, with leave to defendant to plead at next term.

22 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 14th day of April, anno Domini one thousand eight hundred and seventy-three, at the United States court-room, in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on April 26, A. D. 1873, as follows:

DENNIS G. KENNY & THOMAS FOLEY
vs.
THE LITTLE ROCK, PINE BLUFF & NEW ORLEANS R. R. Co.

Comes the defendant, by T. D. W. Yonly, esq., her attorney, and files herein the separate answers of D. C. Sawin and the railroad company, and come the plaintiffs, by Gallagher and Newton, esqs., their attorneys, and both parties announcing themselves ready for trial, a jury came, to wit: Newton Smith, Ben. T. Embry, Francis H. Moody, David Whitten, H. L. Fletcher, C. A. Williams, John W. Rison, Marmaduke Osborne, Simon Poe, Thomas Kirkwood, Noah H. Badgett, and John L. Hicks, being twelve good and lawful men of the district, who were duly
23 tried, empannelled, and sworn well and truly to try the issues joined herein, and a true verdict give, according to the law and the evidence; and thereupon the jury proceed to hear the evidence, as well on the part of the plaintiffs as of the defendants, and having heard the evidence and argument of counsel, and being charged and instructed by the court, retired to consult of their verdict.

Answer of Sawin.

Which answer of D. C. Sawin is in the words and figures following, to wit:

And comes the said defendant, Daniel C. Sawin, and for answer to said third count of said plaintiffs, said complaint' says that, having a short time previous thereto entered into a contract with his codefendant, the said Little Rock, Pine Bluff and New Orleans Railroad Company, to build the company's said railroad, he did, on the 17th day of October, 1870, enter in the contract in said complaint with the said plaintiffs as subcontractors, to do the grading and other work in said contract *were bound* at and for the price therein mentioned.

24 2. That is not true that this defendant was at the time of the execution of said contract one of the directors of said railroad company, but he was a stockholder therein; but this defendant says that it is not true that he was the agent of said railroad company for the purpose of making said contract, and he says that he did not represent to said plaintiffs, at the time of the making of said contract, and the execution thereof, that he was the agent of said railroad company, and in fact says that he was not the agent of said railroad company, and that

he did not execute said contract on behalf of himself and the said railroad company, but on behalf of himself alone; nor is it true said contract was entered into by said plaintiffs, and afterwards performed by them, upon the understanding that said contract had been entered into between said plaintiffs and said railroad company; and this defendant charges that said plaintiffs were informed by him, and well knew, that this defendant entered into said contract in his own behalf only, and that he did not make and execute said contract on behalf of said railroad company.

25 3. This defendant admits that, by the terms of said contract, it was agreed that this defendant, as party of the first part thereto, should pay to said plaintiffs for ties to be furnished and work and labor to be performed the prices in said complaint mentioned, and at the times and terms stated, and that this defendant did agree to receive each mile of said road upon the acceptance thereof by the chief engineer of said company, when said plaintiffs should be released from performing further work thereon.

4. This defendant admits that it is true that he did extend the time for the completion of said contract beyond the time mentioned in said contract.

II. And for answer to the fourth count of the said plaintiffs' said complaint, this defendant says:

1. That it is true that after said contract had been entered into between the said plaintiffs and this defendant as aforesaid, said plaintiffs employed a force of hands and proceeded to perform said contract on their part, and that after said plaintiffs had proceeded some way in the

26 execution of said contract, it became apparent to defendant that said plaintiffs could not complete said work in the time fixed in said contract, and defendant thereupon, at the request of plaintiffs, granted them further time to complete said works in, and that said plaintiffs thereafter proceed' with said work; and this defendant admits that it is true that he did not always pay the estimate at the time fixed in said contract, because he says that, owing to the embarrassed condition of said railroad company, said company was unable to pay to the defendant the sums of money due to this defendant for the construction of said railroad at the time fixed in the contract entered into between said railroad company and this defendant.

2. This defendant says that it is not true that the plaintiffs completed all the work and furnished all the materials required of them by this defendant, according to said contract, by the 3d day of May, 1871, for this defendant in fact says that said plaintiffs have not up to this day furnished said ties and performed said work according to the

27 terms of said contract, but that plaintiffs failed to distribute fifteen hundred of said ties along or upon said road-bed, as by said contract they were required to do, and have likewise failed to grade said road-bed in many places up to the grade required by the survey thereof and in accordance with the terms of said contract.

3. This defendant denies that it is true that said work done and materials furnished accepted and approved by said railroad company or by this defendant.

4. And this defendant further denies that there was due to the said plaintiffs, on the 3d day of July, or any time since, from said railroad company, or from this defendant, after allowing all credits for said material and work, the sum of eleven thousand five hundred and ninety-six dollars and seventy-seven cents, or any other like large sum, nor are the said plaintiffs entitled to recover that sum from said railroad com

pany or this defendant, with interest, less the credits mentioned in said complaint mentioned.

28 III. And this defendant, for answer to the said plaintiffs' fifth count of their said complaint, says that it is not true that the said railroad company and this defendant, or either of them, were, on the 12th day of January, 1872, indebted to the said plaintiffs in the sum of eight thousand eight hundred and sixteen dollars and eighty cents for materials furnished and work done by said plaintiffs; and this defendant avers that the entire sum of money due from this defendant to said plaintiffs at the time of the commencement of this suit said materials furnished and work done under said contract was the sum of twenty-five hundred dollars, for which this defendant hereby offers to let judgment go against him.

IV. And this defendant, further answering, says that said plaintiffs did not perform said contract on their part, because he says that they did not in many places bring said road-bed up to the height required by the survey, and in other places did not construct said road-bed at all, and yet this defendant says the said plaintiffs in their said claim

29 charge for the full number of cubic yards of earth which were contained in said road-bed by the approximate estimate thereof; when in fact said road-bed as constructed by said plaintiffs, by reason of their having failed to bring said road-bed up to the required grade in some places, and their failure to construct said road-bed in other places, falls short of the number of cubic yards contained in said approximate estimate by about 19,000 cubic yards.

V. That said plaintiffs wholly failed to keep and perform their said contract, in this, that they did not furnish all said ties upon said road, and distribute the same upon said road-bed or near the same, nor did they execute said work in a good and workman-like manner.

VI. That the defendant not owing said plaintiffs except as above admitted, wherefore he prays judgment and his costs.

YONLY, *for Sawin.*

30 The said Daniel C. Sawin being sworn, says that he believes the statements of the foregoing answer are true.

D. C. SAWIN.

Subscribed and sworn to before me this 26 April, 1873.

FRANK E. WRIGHT, *Clk.*,
By RALPH L. GOODRICH,
Deputy Clerk.

Answer of railroad company.

Which answer of the railroad company is in the words and figures following, to wit:

And comes the said Little Rock, Pine Bluff and New Orleans Railroad Company, and for answer to said plaintiffs' complaint herein says:

I. That it is not true that said defendant Sawin was at the time of the execution of said contract the agent of this defendant, and such only authorized to execute said contract on behalf of this defendant.

II. That said defendant Sawin was not the agent of this de-

31 fendant, and was not authorized by or empowered as the agent of this defendant to execute said contract.

III. This defendant does not owe the said plaintiffs the said sum of money mentioned in the said complaint or any part thereof; wherefore the defendant prays judgment, &c.

YONLEY, *for R. R. Co.*

I, T. D. W. Yonley, do solemnly swear that I am the attorney of said R. R. Co.; that I believe the foregoing answer to be true.

T. D. W. YONLY.

Sworn to and subscribed before me this 26 day of April, 1873.

FRANK E. WRIGHT, *Clk.*,
By RALPH L. GOODRICH,
Deputy Clk.

And on April 28th, A. D. 1873, as follows:

DENNIS G. KENNY & THOMAS FOLEY
vs.
THE LITTLE ROCK, PINE BLUFF & NEW ORLEANS R. R. Co.

32 Come the plaintiffs, by Gallagher and Newton, esqs., their attorneys, and comes the defendant, by T. D. W. Yonley, esq., her attorney, and come the jury, to wit, Newton Smith, Ben. T. Embry, Francis H. Moody, David Whitten, H. L. Fletcher, C. A. Williams, John W. Rison, Marmaduke Osborne, Simon Poe, Thomas Kirkwood, Noah H. Badgett, and John Q. Hicks, and return into court the following verdict: "We, the jury, find in favor of Little Rock, Pine Bluff and New Orleans Railroad Company; and we find against the defendant, Daniel C. Sawin and in favor of the said plaintiffs, the sum of nine thousand one hundred and thirty-one dollars and ninety-eight cents for their damages and interest."

It is therefore ordered, considered, and adjudged, that the said defendant, The Little Rock, Pine Bluff and New Orleans Railroad Company go hence without day, and have and recover of and from said plaintiffs all the costs in this behalf by said company expended and have execution thereof. And it is further ordered, considered, and adjudged that said plaintiffs, Dennis G. Kenny and Thomas Foley do have, recover of and from said defendant Daniel C. Sawin, the sum of nine
33 thousand one hundred and thirty-one dollars and ninety-eight cents for their damages in this behalf by them sustained, besides all their costs in this behalf by them expended, and have execution thereof.

And on April 29th, A. D. 1873, as follows:

DENNIS G. KENNY & THOMAS FOLEY
vs.
THE LITTLE ROCK, PINE BLUFF & NEW ORLEANS R. R. Co.

Comes the defendant Sawin, by T. D. W. Yonley, esq., his attorney, and files herein his motion in arrest of judgment, and come the plaintiffs, by Gallagher and Newton, esqs., their attorneys, and said motion is heard, argued, and submitted to the court, and the court being well advised in the premises, considers that said motion be overruled and denied, to which ruling of the court defendant's attorney excepts; which exception is noted of record.

Motion in arrest.

Which motion in arrest of judgment is in the words and figures following, to wit:

34 And comes the said Daniel Sawin, one of the defendants herein, and moves the court here to arrest judgment in this cause, and the said defendant for cause shows, 1st: That said plaintiffs do not by their said complaint state facts sufficient to constitute a cause of action.

2d. That said plaintiffs have not by their said complaint stated or shown any right or cause of action against this defendant.

T. D. W. YONLEY,
Atty. for Deft. Sawin.

And on May 5, A. D. 1873, as follows:

DENNIS G. KENNY & THOMAS FOLEY
vs.
THE LITTLE ROCK, PINE BLUFF & NEW ORLEANS R. R. Co.

Comes the defendant Sawin, by T. D. W. Yonley, esq., his attorney, and files herein his writ of error and citation, and also his supersedeas bond, which are allowed and approved by the court.

Bond.

Which supersedeas bond is in the words and figures following, to wit:

35 Know all men by these presents that we, Daniel C. Sawin, and Powell Clayton, and Jackson E. Sickels, are held and firmly bound unto the above-named Dennis Kinny and Thomas Foley, in the sum of eighteen thousand two hundred dollars, to be paid to the said Dennis Kinny and Thomas Foley, their executors and administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 2nd day of May, 1873.

Whereas the above-named Daniel C. Sawin hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered against him in the above-entitled suit by the United States circuit court for the eastern district of Arkansas:

Now, therefore, the condition of this obligation is such that if the above-named Daniel C. Sawin shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

D. C. SAWIN. [SEAL.]
POWELL CLAYTON. [SEAL.]
J. E. SICKELS. [SEAL.]

Sealed and delivered in the presence of—
RALPH L. GOODRICH.
T. D. W. YONLEY.

Taken and approved May 5, 1873.

HENRY C. CALDWELL,
Dist. Judge.

36 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Before me, Ralph L. Goodrich, a commissioner of the United States in and for the eastern district of Arkansas, personally appeared Powell Clayton, who, being duly sworn, deposes and says that he is worth the sum of twenty thousand dollars over and above all his just debts and liabilities, and in property not exempt from sale on execution, or other legal process.

POWELL CLAYTON.

Subscribed and sworn to before me this 2d day of May, A. D. 1873.
RALPH L. GOODRICH,
U. S. Comr.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Before me, Ralph L. Goodrich, a commissioner of the United States in and for the eastern district of Arkansas, personally appeared Jackson E. Sickels, who, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities, and in property not exempt from sale on execution, or other legal process.

J. E. SICKELS.

Subscribed and sworn to before me this 2 day of May, A. D. 1873.
RALPH L. GOODRICH,
U. S. Comr.

37 *Citation.*

Which citation is in the words and figures following, to wit:

By the honorable Henry C. Caldwell, one of the judges of the circuit court of the United States for the eastern district of Arkansas, in the 8th circuit.

To Dennis G. Kenny and Thomas Foley:

Whereas, there has lately issued out of the Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the United States for the eastern district of Arkansas, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between Dennis G. Kenny and Thomas Foley against Daniel C. Sawin, who is impleaded therein with the Little Rock, Pine Bluff and New Orleans Railroad Company, a manifest error hath happened, to the great damage of the said Daniel C. Sawin;

And whereas, for the correction of that error in due manner, the said writ has been issued returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the 13th day of October next: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said 13th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Little Rock, in the eastern district of Arkansas, in the 8th circuit, the 5th day of May, in the year of

our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

HENRY C. CALDWELL,
Dist. Judge.

38 On which citation is the following indorsement:

LITTLE ROCK, ARKS.

We acknowledge due and legal service of the within citation and notice.

GALLAGHER & NEWTON,
Attys. for the plffs. Kenny & Foley.

39 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the 8th circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of their originals on file and remaining of record in my office, and constitute the complete record in said cause.

In witness whereof I have hereunto set my hand and the seal of said court this 20th day of September, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-eighth.

Attest:
[SEAL.] RALPH L. GOODRICH, *Clerk.*

(Indorsement on cover:) No. 307. Daniel C. Sawin, plaintiff in error, vs. Dennis G. Kenny & Thomas Foley. E. Arkansas C. C. U. S. Filed 27th October, 1873.

D

Supreme Court of the United States.

DANIEL C. SAWIN, Plaintiff in Error,

v.

DENNIS G. KENNEY, and THOMAS FOLEY, Defendants.

No. 87.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANTS.

Kenney and Foley sued Sawin and the Little Rock Pine Bluff and New Orleans Railroad Company, on a contract for work and labor to be done for the railroad company by Kenney and Foley, made and entered into by Sawin and K. and T., on the 17th day of October, 1870. (See contract, page 5, Trans.) On the trial of the case the jury found in favor of the railroad company, and a judgment was rendered accordingly, but the verdict was against Sawin, and judgment on that verdict for $9,131 98. (Trans., p. 11.)

Sawin moved arrest of judgment, because the complaint stated no cause of action, and because the complaint stated or showed no right or cause of action against him, Sawin. (Trans., pp. 11, 12.) The court overruled the motion, Sawin excepted, and sued out a writ of error. It will be observed the contract is signed by Sawin in his own style of *D. C. Sawin*, and not as agent, and he is called throughout the contract the party of the first part. Sawin is not named in the body of the contract as agent for the railroad, but

he contracts for work and labor to be done for and on the road. That Sawin is bound by this contract there can be no doubt. Upon its face, it is his contract. (*Story on Agency*, 8th edition, §§ 154–160; *Ib.*, 260.)

Although Sawin, by this contract, bound himself personally, yet this by no means shows that the railroad, the principal, may not also be bound; for there is no question that parol evidence is admissible to show that Sawin was agent for the railroad so as to bind it. The liability of the principal depends upon the act, and not merely upon the form in which it is executed. The only difference is, where the contract, as in this case, is in the name of the agent, he adds his own personal liability to that of his principal. (*Story, sup.*, 270.)

The facts in the case are not in this record, as the whole case comes up on the sufficiency of the complaint. It is certain that Sawin is responsible under this contract, and it is certain also, if the proof were sufficient to establish Sawin's agency, the railroad is liable also as principal.

The only remaining question is, could the railroad and Sawin be joined as defendants in this suit? That they could be is settled, almost as a consequence of the law as already stated. But the law is express it can be done. (*Story, sup.*, 272 *et seq.; Ford* v. *Williams*, 21 *How.*, 289; 3 *Rob. Pr.*, 51, 52.)

If the agent signs his name alone, without disclosing the name of his principal, and the principal is afterwards ascertained, both can be sued. (2 *Kent*, (11th edition,) *p.* 834; *Note* 1 *to Story, sup.*, 270.)

The judgment of the court below, in overruling the motion in arrest, is so manifestly correct, an affirmance with damages under the rule of this court must be insisted on.

GARLAND,
For Defendants.

he contracts for work and labor to be done for and on the road. That Sawin is bound by this contract there can be no doubt. Upon its face, it is his contract. (*Story on Agency*, 8th edition, §§ 154–160; *Ib.*, 260.)

Although Sawin, by this contract, bound himself personally, yet this by no means shows that the railroad, the principal, may not also be bound; for there is no question that parol evidence is admissible to show that Sawin was agent for the railroad so as to bind it. The liability of the principal depends upon the act, and not merely upon the form in which it is executed. The only difference is, where the contract, as in this case, is in the name of the agent, he adds his own personal liability to that of his principal. (*Story, sup.*, 270.)

The facts in the case are not in this record, as the whole case comes up on the sufficiency of the complaint. It is certain that Sawin is responsible under this contract, and it is certain also, if the proof were sufficient to establish Sawin's agency, the railroad is liable also as principal.

The only remaining question is, could the railroad and Sawin be joined as defendants in this suit? That they could be is settled, almost as a consequence of the law as already stated. But the law is express it can be done. (*Story, sup.*, 272 *et seq.; Ford* v. *Williams*, 21 *How.*, 289; 3 *Rob. Pr.*, 51, 52.)

If the agent signs his name alone, without disclosing the name of his principal, and the principal is afterwards ascertained, both can be sued. (2 *Kent*, (11th edition,) *p.* 834; *Note* 1 *to Story, sup.*, 270.)

The judgment of the court below, in overruling the motion in arrest, is so manifestly correct, an affirmance with damages under the rule of this court must be insisted on.

GARLAND,
For Defendants.

U. S. Supreme Court.

No. 14.

DANIEL C. SAWIN, *Plaintiff in Error,*

vs.

DENNIS G. KENNEY & THOMAS FOLEY.

Brief for Plaintiff in Error.

National Republican Printing House.

IN THE

Supreme Court of the United States.

No. 14.

DANIEL C. SAWIN, PLAINTIFF IN ERROR,

vs.

DENNIS G. KENNEY AND THOMAS FOLEY.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

The complaint in this case alleges that the contract upon which suit was brought was made by the railroad company, "acting by her duly authorized agent in this behalf, Daniel C. Sawin, one of the directors at the time, and large stockholder of and in the said railroad company, and duly authorized and empowered by said railroad company to make any and all contracts in behalf thereof for the building and construction of the same; and for obtaining the necessary supplies, labor and materials for that purpose, the said Daniel C. Sawin, signing his own individual name to said written articles of agreement and contract, and then and there representing to said plaintiffs that he was acting in behalf of and representing said railroad company, his co-defendants herein, under full authority so to do, and so acting in the premises as plaintiffs state, and which articles of agreement and contract was solely entered into and afterwards performed on their part by said plaintiffs upon that understanding, *and none other whatsoever.*"

Now, according to the complaint, the contract sued upon is the contract of the railroad company and defendants in error, and no other parties can be sued thereon or be bound thereby. But the judgment was rendered against Sawin, the

agent of the railroad company, and the railroad company recovered its costs.

The judgment of the court below must be reversed for the following reasons, viz:

1. If the contract was made by the railroad company and defendants in error solely, as is alleged in the complaint, then Sawin was not liable, and a judgment against him is error.

2. If the contract was made by both the railroad company and Sawin and defendants in error, then a judgment against any of the contracting parties, and not against both, is error, and must be reversed.

3. If the contract was made by Sawin solely, on the one part, and defendants in error on the other, and the proof established such a state of facts, then, in order to recover in the case, defendants in error should have amended their complaint before submitting the case to the jury so as to show such a contract. But, having failed to amend their complaint, the verdict is not supported by the record before this court, and the judgment of the court below should therefore be reversed.

4. The allegation in the complaint, "that said defendant, Daniel C. Sawin, by signing said contract jointly with his co-defendant, the said railroad company," (Record, p. 4, at top of page,) will not so cure the complaint as to authorize or justify a judgment against Sawin alone.

If the railroad company and Sawin were *jointly* liable upon the contract, a judgment against one of the parties only, where both are proceeded against, is error, and should be reversed. This principle of law is so well established that we deem this citation sufficient, viz:

"Yet, in actions for the breach of a contract, whether it be "framed in assumpsit, covenant, debt, or case, a verdict can-

"not, in general, be given in a joint action against one de-
"fendant without the other."

Chitty on Pleading, vol. 1, (American edition,) p. 44, and note R.

Counsel for defendants in error says, in his brief herein, and very justly and properly, "the whole case comes up on the sufficiency of the complaint." Indeed, a careful reading of his brief only serves to strengthen our theory of this case. We ask that judgment be reversed.

QUINTON CORWINE,
WM. M. SPRINGER,
Counsel for Plaintiff in Error.